IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-71

UNITED FEDERATION OF TEACHERS and
UNITED FEDERATION OF TEACHERS WELFARE FUND,

Petitioners,

—versus—

WOMEN IN CITY GOVERNMENT UNITED,
et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, United Federation of Teachers and United Federation of Teachers Welfare Fund respectfully pray that a Writ of Certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 14th, 1975 and March 26, 1975, respectively, the latter opinion being incorporated by reference into said order.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix "B") is not yet officially reported and is to be considered the opinion in this case by reason of the incorporation therein by reference of the same in the order made in the case (Appendix A). The opinion of the District Court (Appendix C) is reported at 379 F.Supp. 679.

JURISDICTION

The order of the Court of Appeals (Appendix A) incorporating therein an opinion rendered in a related case (Appendix B) and directing a remand of the action to the United States District Court for the Southern District of New York for further proceedings not inconsistent with decision rendered in the related case was made April 14, 1975. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Does the exclusion of pregnancy and related conditions from fringe benefit coverage provided by the Welfare Fund of a municipal labor organization representing public employees constitute sex discrimination proscribed by Title VII of the 1964 Civil Rights Act as amended?

STATUTES INVOLVED

The FOURTEENTH AMENDMENT to the United States Constitution provides in relevant part:

"Section 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000(e) 2, *et seq.*, provides in relevant part:

(a) It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

STATEMENT OF THE CASE

The Respondent commenced this action on January 17, 1974 against sixteen defendants including Petitioners herein. Included among the defendants were one city, two mayors, one city personnel director, two municipal corporations, one municipal authority, one board of education, two insurance carriers, three municipal labor organizations representing public employees and three welfare funds affiliated with the three named labor organizations.

The complaint herein filed by Respondent and fourteen employees alleges that the previously described defendants have violated Title VII, the Fourteenth Amendment to the United States Constitution and various provisions of New York State

Law by providing fringe benefits which are less favorable to women than to men.

Respondents allege in their first cause of action that the employers have discriminated against employees on the basis of sex in that health and hospitalization insurance plans provided by the employers offer substantially fewer benefits for pregnancy and pregnancy related conditions than for other medical and surgical problems requiring hospital and medical care.

In the second cause of action, two insurance carriers are joined with the City of New York and its related agencies as having aided and abetted the City in allegedly providing discriminatory health and hospitalization insurance.

In the third cause of action, Petitioner, the United Federation of Teachers (UFT), and the Social Service Employees Union (SSEU) and District Council 37, American Federation of State, County and Municipal Employees (AFSCME) are joined as having allegedly negotiated discriminatory health and hospitalization fringe benefits with the City.

In the fourth cause of action, it is alleged that the City, Petitioners, UFT and United Federation of Teachers Welfare Fund (UFT Welfare Fund) have established and administered programs which are discriminatory with respect to providing benefits for pregnancy and pregnancy related conditions.

In particular, the Complaint alleges that the UFT and the UFT Welfare Fund violated the proscription against discrimination on the basis of sex contained in Title VII in that:

> "Defendants. . .have. . .discriminated against plaintiffs and the class because of sex, in that they have negotiated and approved health and hospitalization insurance fringe benefits which are discriminatory thereby causing plaintiffs and the class they represent damages..."

"Defendants. . .have discriminated against plaintiffs. . .and other class numbers because of sex, in that the defendants have established and administered the defendant UFT Welfare Fund which offers no temporary disability benefits for disability resulting from pregnancy and pregnancy-related conditions, while temporary disability payments are provided for disability resulting from other medical and surgical conditions."

The Answer submitted on behalf of the UFT and the UFT Welfare Fund denied the previously described allegations of the complaint.

On June 26, 1974, District Court Judge Whitman Knapp afforded the parties the opportunity to file briefs as to whether, in light of this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484, (1974) 94 S.Ct. 2485, the Complaint should be dismissed by the Court, *sua sponte*. On July 30, 1974, by joint opinion and order (Appendix C), Judge Knapp dismissed the Complaints in two unrelated cases, the instant case and a case instituted by the *Communication Workers of America against American Telephone & Telegraph* (CWA) 379 F.Supp. 679 with leave to replead and certified to the U.S. Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. 1292(b) "the question whether *Aiello* has established . . . that disparity between the treatment of pregnancy related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition of either Title VII or of the Fourteenth Amendment."

Upon the Respondent's election not to replead facts alleging invidious discrimination, the complaint was dismissed in its entirety with prejudice. (Appendix D).

Thereafter, the Court of Appeals for the Second Circuit agreed to hear the certified questions in the CWA case but refused in the action concerned herein.

Respondent then served a Notice of Appeal to the Court of Appeals for the Second Circuit and moved for a consolidated hearing with the CWA case. This application was denied.

Separate oral arguments were scheduled in the two unrelated matters and briefs were prepared, served and submitted in connection with the action concerned herein. However, before the date oral argument was scheduled to be heard in the matter concerned herein, the Court of Appeals for the Second Circuit rendered a decision and order (Appendix B) remanding the CWA case to the District Court for appropriate proceedings consistent with its opinion.

Respondent immediately moved to remand the action concerned herein on the basis of the opinion in the CWA case and said motion was granted (Appendix A), before Petitioners had had any opportunity to argue the appeal taken by the Respondent.

REASONS FOR GRANTING THE WRIT

1.

The Court of Appeals has decided an important question of federal law in a case of novel impression which requires decision by the Supreme Court of the United States.

The Second Circuit's opinion in the unrelated CWA case reflects important statutory and policy decisions affecting employers in the private sector of employment as distinguished from the public sector. That case did not involve any allegations that a labor organization or any welfare fund furnishing benefits to employees violated the provisions of Title VII of the Civil Rights Act.

Nonetheless, the Court of Appeals, without hearing the argument scheduled to be heard in connection with an appeal

taken as of right by the Respondent, remanded the action concerned herein involving public or municipal employers, welfare funds, a City, Mayors, City personnel director, municipal corporations and authority and insurance carriers, to the District Court for further proceedings not inconsistent with the opinion in the wholly unrelated case aforesaid (CWA).

In its decision in *Geduldig* v. *Aiello, supra,* this Court squarely held that the exclusion of pregnancy and pregnancy related conditions from a state administered insurance program in and of itself does not constitute discrimination on the basis of sex. In this connection, the Court concluded that the Equal Protection Clause of the Fourteenth Amendment did not obligate the State of California to provide coverage for absences from work due to normal pregnancy under the state administered disability benefit plan. Having reviewed the California disability benefit plan with respect to its inclusions and exclusions of disability risks, this Court, concluded that the state disability plan did not discriminate against any definable group or class, and noted "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."

In dismissing the complaint herein, Judge Knapp relied upon footnote 20 of *Aiello* which he found to be dispositive of the instant issue, as follows:

> ". . . 'this case is thus a far cry from cases like *Reed* v. *Reed,* 404 U.S. 71, and *Frontiero* v. *Richardson,* 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition – pregnancy – from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra* and *Frontiero,*

supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. . .

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups – pregnant women and nonpregnant persons.* While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.' "

It would have seemed by virtue of this Court's decision in *Aiello* that this Court had unquestionably rejected any contention to the effect that classification on the basis of pregnancy, a natural and necessary female contribution is prima facie violative of Title VII.

It would have also seemed settled that the standard to be applied to cases involving exclusions from disability benefit coverage is the same when applied to causes of action brought under either the Fourteenth Amendment or Title VII. That standard simply stated is: does the particular exclusion constitute discrimination based on sex?

In the course of its consideration as to the propriety of establishing exclusions from a disability benefit plan, this Court held that the exclusion of pregnancy does not constitute sex discrimination –

"[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other. . ."

Nowhere in the complaint does Respondent plead or contend that the UFT or the UFT Welfare Fund excludes pregnancy or pregnancy related conditions from disability coverage as a pretext designed to effect invidious discrimination against women. In any event such was not the case.

In his decision of July 30, 1974, Judge Knapp cogently stated:

"The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified – or less justifiable in the employment context than in some other context – can never be reached.

In other words, if the *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the Court. The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with

discrimination 'because of ... sex.'" 42 U.S.C. Sec. 2000 e (2) (a) (1)."

Supporting Judge Knapp's conclusion that the same standards are applicable in a sex discrimination case arising under the Fourteenth Amendment and Title VII are such cases as *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1176, (2d Cir. 1972) and *U.S.* v. *Chesterfield County School District*, 484 F.2d 70, 73, (4th Cir. 1973). In *Chance* v. *Board of Examiners, supra*, the Second Circuit recognized that it would be "anomalous at best" were public and private employers, in employment practice cases to be held to different standards under the Fourteenth Amendment and Title VII. Similarly, in another employment practice case, *U.S.* v. *Chesterfield County School District, supra*, the Fourth Circuit concluded:

"... the test of validity under Title VII is not different from the test of validity under the Fourteenth Amendment."

Recognizing that this Court granted certiorari on the 27th day of May, 1975 in the *Matter of Liberty Mutual Insurance Company, Petitioner* v. *Sandra Wetzel and Mari Ross, et al*, involving the application of *Aiello*, Title VII and related issues in the *private* sector of employment and that concomitant issues are presented in this case with respect to the application thereof in the *public* sector of employment and with respect to welfare funds of municipal labor organizations, it is respectfully urged that the same be resolved by this Court by granting a Writ of Certiorari herein in order that the issues may be heard and determined at the same time.

2.

The Order and Decision Below Conflicts With Decisions of Other Courts as to the Proper Interpretation of *Geduldig* v. *Aiello* In The Administration of Title VII

In contrast to the decision of Judge Knapp, the District Court in *Sale* v. *Waverly-Shell Rock Board of Education* F. Supp. 9 FEP Cases 138, 141 (N.D. Iowa 1975) having found a Title VII violation and having declined to apply the *Aiello* rationale, certified the case pursuant to 28 U.S.C. §1292(b), stating "this order involves a controlling question of law as to which there is a substantial ground for difference of opinion."

As this Petition was in its final stages of preparation, counsel was advised that on or about June 28, 1975, the Court of Appeals for the Fourth Circuit in *Gilbert* v. *General Electric Company* No. 74-1557, 375 F. Supp. 697, (E.D. Vir. 1974) had concluded that women employees were entitled to disability pay under the company's insurance plan for absence due to childbirth or pregnancy complications. As a result of the voluminous judicial[1] and administrative agency[2] litigation resulting from the *Aiello* decision, this Court is respectfully urged to explicate its holdings in *Aiello* and its application to Title VII.

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[1] *Vineyard* v. *Hollister Elementary School District*, 8 FEP Cases 1009, (N.D. Cal. 1974); *Bales* v. *General Motors Corp.* 9 FEP Cases 234 (N.D. Cal. 1975); *Monell* v. *Dept. of Social Services*, 10 FEP Cases 789 (S.D.N.Y. 1975); *Union Free School District* v. *N.Y. State Human Rights Appeal Board* N.Y. 2d (1974, 10 FEP Cases 431;

[2] *Foster* v. *N.Y.C. Board of Education*, Case No. GCS-33448-74 (New York State Division of Human Rights); *Leigh* v. *City of New York*, Case No. GCSF-29884-73 (New York State Division of Human Rights); *Goodkin* v. *N.Y.C. Board of Education*, Case No. GCSF 32332-74 (New York State Division of Human Rights).

CONCLUSION

For the foregoing reasons, the UFT and the UFT Welfare Fund respectfully pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York on the Fourteenth day of April, one thousand and nine hundred and seventy-five.

Women in City Government United, Barbara Robertson, Leslie Boyarsky, Jacquelin Gross, Arlene Friedman, Robert Sussman, Alicia Cantelmi, Pamela Mills, Susan Pass, Linda Zises, Emily Blitz, Susan Padwee, Elaine Justic, Eula Carter, and Linda Shah, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

The City of New York, Abraham Beame, as Mayor of the City of New York; John V. Lindsay, Harry Bronstein, as City Personnel Director; New York City Health and Hospitals Corporation; New York City Housing Authority; New York City Off-Track Betting Corporation, Joseph Monserrat, Seymour P. Lachman, Isaih E. Robinson, Jr., Mary E. Meady, et. al.,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated March 27, 1975 to vacate summarily the order of the United States District Court for the Southern District of New York and to remand this action to the United States District Court for the Southern District of New York for further proceedings not inconsistent with this court's decision indecision in *Communications Workers of America* v. *American Telephone & Telegraph Co.* (Docket #74-2191) is granted.

s/ _____
IRVING R. KAUFMAN

s/ _____
J. EDWARD LUMBARD

s/ _____
J. JOSEPH SMITH, *Circuit Judges*

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 461—September Term, 1974.

(Argued December 9, 1974 Decided March 26, 1975.)

Docket No. 74-2191

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, Individually and on Behalf of All Similarly Situated Non-Supervisory Female Employees of American Telephone and Telegraph Company, Long Lines Department,

Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Defendant-Appellee.

Before:

FEINBERG and MULLIGAN, *Circuit Judges*
and BRYAN, *District Judge**

Interlocutory appeal from an order of the United States District Court for the Southern District of New York (Whitman

*Frederick vP. Bryan, of the Southern District of New York, sitting by designation.

Knapp, *J.)*, which dismissed the complaint in the action with leave to replead and certified a question to this court pursuant to 28 U.S.C. §1292(b). Certified question answered in the negative, order dismissing complaint reversed and action remanded.

MARY K. O'MELVENY, New York, New York (Cohn, Glickstein, Lurie, Ostrin & Lubell, New York, New York, Jonathan W. Lubell and H. Howard Ostrin, of counsel; Kane & Koons, Washington, D.C., Charles V. Koons, of counsel), *for Plaintiffs-Appellants.*

THOMPSON POWERS, Washington, D.C. (Steptoe & Johnson, Washington, D.C., James D. Hutchinson and Kenneth I. Jonson, of counsel; Harold S. Levy and Jim G. Kilpatric, New York, New York), *for Defendant-Appellee.*

LINDA COLVARD DORIAN, Washington, D.C. (United States Equal Employment Opportunity Commission, William A. Carey, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg and Charles L. Reischel, of counsel), *for amicus curiae EEOC.*

Amicus Brief, urging affirmance, was filed by Alaska Airlines, Inc., et al. (Gordon Dean Booth, Jr., Atlanta, Georgia; Troutman, Sanders, Lockerman and Ashmore, and Robert N. Meals, Jr., of Counsel, all of Atlanta, Georgia.)

Amicus Briefs, urging reversal, were filed by International Union of Electrical, Radio and Marine Workers, et al. (Winn Newman, Ruth Weyand, Marcia D. Greenberger, Joseph N. Onek and Lois J. Schiffer, all of Washington, D.C., and Irving Abramson, Stephen C. Vladeck, Frank J. Donner, James G. Maura, Jr., and Robert Z. Lewis, all of New York, New York); New York Civil Liberties Union (Eve Cary, New York, New York; Ruth Bader Ginsburg, Melvin L. Wulf, Kathleen Peratis, Wendy Webster Williams,

New York, New York, of Counsel); Bellamy Blank Goodman Kelly & Stanley (Mary F. Kelly, Nancy E. Stanley, New York, New York); New York State Division of Human Rights (Henry Spitz, General Counsel, Ann Thacher Anderson of counsel, New York, New York).

BRYAN, *District Judge:*

This is an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from an order of the United States District Court for the Southern District of New York (Whitman Knapp, *J.*) which dismissed the complaint in this action with leave to replead and certified a question to this Court. This Court has allowed the appeal on the question so certified.

The suit, commenced on July 31, 1973, is a class action brought by plaintiffs-appellants Communications Workers of America, AFL-CIO (CWA) and Esther Skipper, under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000-e et seq.[1] The complaint alleges that the Long Lines Department of defendant-appellee American Telephone & Telegraph Company (Long Lines) violated Title VII, which prohibits discrimination in employment between employees on the basis of sex.

The allegations of the complaint as to specific policies and practices of Long Lines claimed to be violative of Title VII are obviously based on guidelines issued by the Equal Employment Opportunity Commission (EEOC), which is the federal agency charged with enforcement of the Act. These guidelines were designed to prohibit disparity of treatment between pregnancy and other disabilities in the employment context. See 29 C.F.R.

[1] 42 U.S.C. § 2000e-2(a) (1) provides, in relevant part:

"(a) It shall be an unlawful employment practice for an employer –(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

1604.10 (b).[2] The complaint alleges that Long Lines "has promulgated and maintained policies, practices, customs and usages which limit the employment opportunities of its female employees because of sex by failing and refusing to provide equal rights, benefits and privileges to females under temporary disability due to pregnancy or childbirth or complications arising therefrom as are made available to its male employees under temporary disability. [Long Lines'] discriminatory practices and policies involve matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payments under health or disability insurance or sick leave plans. . . ."

Declaratory, injunctive and monetary relief is sought on behalf of all non-supervisory female employees and former female employees of Long Lines, who have been or may be affected by the policies and practices complained of.[3]

The answer admits that under the Long Lines disability benefit plans, sickness and disability benefits are not paid in connection with absences arising on account of "certain conditions attendant to pregnancy, childbirth, or child rearing," but denies that Long Lines' policies and practices constitute sex discrimination in violation of Title VII. The answer includes, among other defenses, a separate defense that any alleged

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[2] 29 C.F.R. §1604.10(b) provides:

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

[3] The complaint also contains appropriate jurisdictional allegations that a complaint was duly filed with the EEOC which gave the required notice of the right to sue.

discrimination on the basis of sex arising from failure to include absences relating to pregnancy, childbirth or child rearing in Long Lines' disability plans "is based upon a rational and neutral business justification" under Title VII.[4]

Prior to the dismissal of the complaint below, both sides had conducted a substantial amount of pre-trial discovery. Discovery had not been completed, however, and as yet no depositions have been taken. A motion concerning class action treatment was pending before the district court.

On June 17, 1974, while that motion was *sub judice*, the Supreme Court decided *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), holding that the provisions of a California statutory state-administered system of disability insurance for private employees which excluded from coverage disabilities arising from normal pregnancy did not violate the Equal Protection Clause of the Fourteenth Amendment.

The district court, in the case at bar, then requested briefs and heard argument on the question of whether the complaint under Title VII should not be dismissed *sua sponte* in the light of *Aiello*.

The opinion of the district court which followed read the majority opinion in *Aiello*, and particularly footnote 20 of that opinion (417 U.S. at 496), as "flatly" holding that disparity of treatment between pregnancy-related and other disabilities cannot be classified as sex discrimination under either the Equal Protection Clause or Title VII, absent a showing that such disparity was a mere pretext designed to effect invidious discrimination against the female sex. It concluded that *Aiello* was decisive of the issues raised by the complaint in this case and that therefore as a matter of law the complaint failed to

[4]The answer also pleads a counterclaim based on collective bargaining agreements between CWA and AT&T, to which CWA has replied denying liability. The counterclaim is irrelevant to this appeal.

state a claim on which relief could be granted under Title VII.[5] The district court dismissed the complaint solely on that ground, with leave to replead,[6] and certified the following question to this court pursuant to 28 U.S.C. § 1292(b):[7]

> "... whether *Aiello* has established—for purposes of [this action]—that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment." [8]

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[5]The district court did not refer to and apparently did not consider any of the factual material obtained through the incomplete discovery conducted by the parties and included in the record on appeal. Though the briefs of the parties and of *amicus curiae* make extended references to such material, it is not relevant on this appeal, which is concerned only with the district court's holding that the complaint on its face was insufficient as a matter of law.

[6]Acknowledging that "if principles of 'notice pleading' were to be applied [the complaint] could be read as broad enough to permit proof of the type of 'invidious discrimination' that would justify relief under either the 14th Amendment or Title VII," the opinion nevertheless construed the complaint as alleging "that disparity with respect to pregnancy-related disabilities in and of itself constituted discrimination on grounds of sex (or gender)...." Apparently, leave to replead was granted to permit plaintiffs to assert a claim that the Long Lines policies and practices were mere pretexts designed to effect invidious discrimination against members of the female sex.

[7]At the same time as the question of *sua sponte* dismissal was argued in the case at bar, the district court also heard argument on the same question in *Women in City Government United, et al.* v. *The City of New York, et al.*, 74 Civ. 304 (S.D.N.Y.). The complaint in that case alleged that a health and hospitalization plan which offered fewer benefits for pregnancy-related conditions than for other medical and surgical problems violated both Title VII and the Equal Protection Clause. The opinion of the district court treated both cases together and reached the same conclusion and certified the same question pursuant to Section 1292(b) in both. In the *Women United* case, however, permission to appeal on the question so certified was denied by the Court of Appeals and the case was remanded to the district court on October 2, 1974. The district court then dismissed the complaint in that action with prejudice. An appeal is presently pending in this court (#74-2352) from that order. A motion to consolidate that appeal with the interlocutory appeal in the case at bar was denied on October 23, 1974. The appeal has not as yet been heard in this Court.

[8]We assume that the Fourteenth Amendment was included in the certified question because the companion action, *Women in City Government United, et al.* v. *The City of New York, et al.*, decided at the same time, charged violation of both the Equal Protection Clause and Title VII. See n.7, *supra*. There is no claim of violation of the Equal Protection Clause in the case at bar and we do not pass on any Equal Protection question.

We think that the question certified does not adequately pose the issue on this appeal. In essence, what the court below held was that *Aiello* established that the disparity of treatment of pregnancy-related disabilities alleged in the complaint *cannot* constitute discrimination under Title VII unless it is alleged and proved to be a mere pretext designed to effect invidious discrimination against the female sex. The real question posed here is whether *Aiello* required dismissal of the complaint in this action as a matter of law for failure to state a claim on which relief could be granted under Title VII. That narrow question is the sole question to which we address ourselves.

We disagree with the district court's reading of *Aiello*. In our view, *Aiello* is not decisive of the issues raised by this complaint under Title VII and the court below was in error in holding that *Aiello* required dismissal of the complaint as a matter of law.

At the outset of the discussion, it is well to bear in mind the admonition of Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheaton (19 U.S.) 264, 399-400 (1821):

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Chief Justice Marshall's admonition has been repeated many times since. For example, in *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133 (1944), *rehearing denied*, 323 U.S. 818 (1945), Mr. Justice Jackson, writing for a unanimous court, stated:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626 (1935); *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404 (1965); *United States* v. *Neifert-White Co.*, 390 U.S. 228, 231 (1968); *Cameron* v. *Mullen*, 387 F.2d 193 (D.C. Cir. 1967); *Irwin* v. *Simmons*, 140 F.2d 558 (2d Cir. 1944); *NLRB* v. *Cities Service Oil Co.*, 129 F.2d 933 (2d Cir. 1942); *Commissioner of Internal Revenue* v. *Marshall*, 125 F.2d 943 (2d Cir. 1942).

These cautions apply with particular emphasis to footnotes or other "marginalia" in Supreme Court opinions, which should be read "within the context of the holding of the Court and the text to which it is appended," *Harkless* v. *Sweeney Independent School District*, 427 F.2d 319, 322 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). See also *John Hancock Mutual Life Insurance Company* v. *Bartels*, 308 U.S. 180, 184 (1939). In view of the wide differences between *Aiello* and the case at bar, these warnings are particularly apposite here.

Aiello involved a challenge under the Equal Protection Clause to a provision of the California Unemployment Insurance Code which excluded disabilities due to normal pregnancy from coverage under a state-administered disability insurance program for private employees. A three-judge court below, with one judge dissenting, found that the exclusion of pregnancy-related disabilities from coverage under the California insurance program "is not based on a classification having a rational and substantial relationship to a legitimate state purpose" and therefore held that the challenged provisions of the statute violated the Equal Protection Clause and were constitutionally

invalid. *Aiello* v. *Hansen*, 359 F. Supp. 792, 801 (N.D. Cal. 1973).

The Supreme Court reversed, with three justices dissenting, *Geduldig* v. *Aiello*, *supra*. Justice Stewart, writing for the majority, considered the legislative purposes and policies sought to be accomplished by the California disability insurance program, the risks involved, the costs of maintaining the program on a sustaining basis and the effects of included pregnancy-related disabilities within its coverage. Relying on *Dandridge* v. *Williams*, 397 U.S. 471, 486-7 (1970); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); and *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955), he pointed out that the Equal Protection Clause does not require a state to attack every aspect of a problem at once, and that "particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the Courts will not interpose their judgment as to the appropriate stopping point." *Aiello*, *supra*, 417 U.S. at 495.

Justice Stewart found that the State had shown a legitimate interest in maintaining its insurance program on a self supporting basis, in keeping benefit payments at an adequate level for covered disabilities and in maintaining the contribution rates at a level not unduly burdensome for participating employees.

Justice Stewart concluded that "these policies provide an objective and wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has," *Aiello*, *supra*, at 496, and held that the exclusion of pregnancy-related disabilities from coverage under the California insurance program did not constitute invidious discrimination because of sex under the Equal Protection Clause.

Justice Brennan, writing for the dissent, was of the view that the California legislative classification was analogous to the

legislative classifications held to be constitutionally invalid in *Reed* v. *Reed*, 404 U.S. 71 (1971) and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Justice Brennan reiterated the views he had expressed in *Frontiero*, *supra*, at 688, that classifications based on sex or gender "are inherently suspect and must therefore be subjected to strict judicial scrutiny." Justice Brennan also quoted his dissenting opinion in *Kahn* v. *Shevin*, 416 U.S. 351, 357-58 (1973) to the effect that "[t]he Court is not . . . free to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification, or by the use of feasible, less drastic means." *Aiello*, *supra*, at 503. In Justice Brennan's view, California had failed to meet that burden and thus its exclusion of pregnancy-related disabilities violated the Equal Protection Clause.

Footnote 20 of the majority opinion,[9] on which the district court below principally relied in holding that *Aiello* required dismissal of the complaint in the case at bar, is in essence a

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[9]The full text of footnote 20, at 496-7, is as follows:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971) and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition – pregnancy – from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups – pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program this accrue to members of both sexes.

refutation of the dissenting view as to the Equal Protection standards of judicial scrutiny applicable to the California legislative classification before the Court. It rejects the dissenting view that the California classification should be treated like the legislative classifications in *Reed, supra,* and *Frontiero, supra.* Stating that not *"every legislative classification* concerning pregnancy is a sex-based classification . . .", it goes on to say that "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers* are *constitutionally free* to include or exclude pregnancy *from the coverage of legislation such as this* on any reasonable basis. . . ." (Emphasis added.) Thus, footnote 20 deals with the constitutional validity of legislative classifications under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more. Moreover, it does so in the context of the extensive record before the Court as to the operation and effects of the particular statutory insurance program it was considering and the considerations which led the California legislature to adopt it.

Nowhere, either in the body of the majority opinion in *Aiello* or in the footnote, is there any reference to the provisions of Title VII or the EEOC guidelines designed to prohibit the disparate treatment of pregnancy disabilities in the employment context. Under the guidelines, disabilities caused by pregnancy or childbirth are declared to be temporary disabilities for all job-related purposes, requiring employers to treat such disabilities on the same terms and conditions as other temporary disabilities are treated.[10]

The EEOC guidelines under Title VII are an administrative interpretation of the Act by the enforcing agency and are thus

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[10] As previously pointed out, p. 2552, *supra,* the allegations of sex discrimination in the complaint in the case at bar are based upon these guidelines.

entitled to "great deference," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971), *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, *J.*, concurring), unless their application would be inconsistent with an obvious Congressional intent. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

If, as the district court below thought, *Aiello* was a definitive holding that, absent mere pretext, disparity of treatment of pregnancy-related disabilities could not constitute a violation of Title VII, *Aiello* would substantially circumscribe the reach of that Act of Congress and would invalidate the guidelines as to treatment of pregnancy disabilities issued by the EEOC. It is inconceivable that the majority opinion intended so to hold without even a mention of Title VII or the guidelines.[11]

Beyond this, the question in the case at bar as to the consequences of disparate treatment of pregnancy-related disabilities in the private employment context must be analyzed and decided in a framework quite different from that in which the question was decided in *Aiello*. Here the issue is one of statutory interpretation, not one of constitutional analysis as in *Aiello*.

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[11] It should be noted that only five months before *Aiello* was decided, Justice Stewart, in his majority opinion in *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974), held that mandatory maternity leave policies for public school teachers of the Cleveland Board of Education violated the Due Process Clause of the Fourteenth Amendment. Title VII was not applicable to the cases before the Court in *La Fleur* since the maternity leaves at issue had occurred before Title VII was amended in 1972 to include state agencies and educational institutions. See Pub. L. 92-261, 86 Stat. 103. In n. 8, at 639, Justice Stewart, referring to the 1972 amendment, expressly pointed out that,

> "Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. 29 C.F.R. s 1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future."

It can scarcely be thought that Justice Stewart in *Aiello sub silentio* invalidated the guidelines which he had said only five months before in *La Fleur* would, in the future, affect suits involving pregnancy-related employment practices.

Under the Commerce Clause, Congress plainly has the power to prohibit by statute various forms of discrimination in private employment which it deems would adversely affect the flow of interstate commerce. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).[12]

Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discriminatory practices forbidden by this statute should be limited to practices violative of the Equal Protection Clause. Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack.

Thus, the question to be decided in the case at bar is *not* as in *Aiello*, whether exclusion of pregnancy-related disabilities from coverage violates the Equal Protection Clause. It is whether, as a matter of statutory interpretation, the practices complained of are forbidden by Title VII and the EEOC guidelines. We agree with the conclusion reached in the several recent well-reasoned cases dealing with the question of whether disparity of treatment between pregnancy-related and other disabilities in the employment context violates Title VII, that *Aiello* is not dispositive of that issue. *Wetzel* v. *Liberty Mutual Insurance Co.*, No. 74-1233 (3d Cir. February 11, 1975), *affirming* 372 F. Supp. 1146 (W.D. Pa. 1974); *Vineyard* v. *Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal. 1974); *Sale* v. *Waverly-Shell Rock Board of Education*, No. C74-2029 (N.D. Iowa Jan. 8, 1975). See also *Union Free School District No. 6* v.

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[12]This is in addition to the Congressional power under Sction 5 of the Fourteenth Amendment to enforce, by appropriate legislation, the dictates of the Equal Protection Clause. That power may reach more broadly than the Equal Protection Clause itself. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *United States* v. *Guest*, 383 U.S. 745, 781-784 (1966) (Brennan, *J.*, concurring and dissenting). See also *Vineyard* v. *Hollister Elementary School District*, 64 F.R.D. 580, 585 (N.D. Cal. 1974).

New York State Human Rights Appeal Board, 35 N.Y.2d 371, 362 N.Y.S.2d 139 (1974); *Farkas* v. *Southwestern City School District*, 506 F.2d 1400 (6th Cir. 1974) (affirming judgment of district court that failure to pay teachers sick leave for absences relating to pregnancy constitutes discrimination on the basis of sex).

Finally, it should be noted that in the case at bar, in contrast to *Aiello*, only the bare allegations of the complaint couched in general language, largely taken from the statute and the guidelines, were before the district court. *Aiello* was decided on a full record in which the nature, details, operations and effect of the state insurance plan under attack and the reasons for its enactment were fully explored. The ultimate merits of the case at bar are not ripe for determination on such a record or at this state of the proceedings.

What has been said thus far disposes of the narrow question presented on this appeal. That question is confined to the allegations of the complaint and the effect of *Aiello* thereon. We think it highly inadvisable, on an interlocutory appeal of this nature, to go beyond the bare limits of the question presented. In this state of the record it would be unwise to discuss any questions which might arise during the further course of the action or to indicate any views which might bear on the ultimate merits. We expressly refrain from so doing.

We hold only that *Aiello* did not require the dismissal of the complaint as a matter of law for failure to state a claim on which relief could be granted under Title VII. Thus, the question posed on this appeal is answered in the negative. The order dismissing the complaint is therefore reversed and the action is remanded to the district court for appropriate proceedings consistent with this opinion.

APPENDIX C

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMUNICATONS WORKERS OF AMERICA, AFL-CIO; ESTHER SKIPPER, Individually and on Behalf of All Similarly Situated Non-Supervisory Female Employees of American Telephone and Telegraph Company Long Lines Department, Plaintiffs -against- AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT, Defendants	73 Civ. 3353 OPINION
WOMEN IN CITY GOVERNMENT UNITED, et al., Plaintiffs -against- THE CITY OF NEW YORK, et al., Defendants	74 Civ. 304

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(75 Civ. 3353)

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(74 Civ. 304)

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KNAPP, D. J.

The complaints in these unrelated class actions make quite similar allegations. They each allege inter alia that the several defendants have, in the treatment of pregnant employees, violated the proscription against discrimination on the basis of sex contained in Title VII of the Civil Rights Act of 1964.

Paragraph 7 of the CWA complaint alleges in part:

> "the defendant has promulgated and maintained policies*** which limit the employment opportunities of its female employees because of sex by failing and refusing to provide equal rights, benefits and privileges to females under temporary disability due to pregnancy or childbirth or complications arising therefrom, as are made available to its male employees under temporary disability."

Paragraph 51 of the WICGU complaint (plaintiffs' first cause of action) alleges:

> "Defendants***have***discriminated against the plaintiffs in this action in the terms and conditions of employment because of sex, in that the health and hospitalization insurance plans negotiated and approved by defendant*** offer substantially fewer benefits for pregnancy and pregnancy-related conditions than for other medical and surgical problems requiring hospital and medical care."

The remaining ten causes of action alleged in the WICGU complaint may fairly be characterized as variations on the theme of paragraph 51, the differences being in the particular defendant named and the type of policy attacked – health and hospitalization insurance or disability benefit.

Motions were argued before me in both cases on May 21, 1974. In *CWA* the motions concerned class action treatment. In

WICGU the major motion had to do with exhaustion of Title VII remedies.

While those motions were sub judice, the Supreme Court decided *Geduldig* v. *Aiello,* 42 U.S.L.W. 4905. We then scheduled argument as to whether in light of *Aiello* – especially footnote 20 of the opinion – this court should *sua sponte* dismiss the complaints in these actions. Having received briefs and heard argument, we so dismiss the complaints with leave to replead, and certify a question to the Court of Appeals.

In *Aiello* the Supreme Court held that California's disability insurance plan which excludes normal pregnancy from coverage does not violate the Equal Protection Clause of the Fourteenth Amendment. Thus, inter alia, the Court observed (at 4908):

> "We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups who are eligible for disability insurance protection under the program."

The Court found legitimate and "wholly non-invidious" California's reasons for not wanting a more comprehensive program – the state's desire to keep the contribution rate low, to keep the program self-supporting, and to provide adequate benefits for some disabilities rather than inadequate benefits for all (id). The Court further found "no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class***." (id.)

The footnote (footnote 20) to the sentence just quoted provides – in our view – the key to the Court's decision. It flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender). In the first paragraph of that footnote the Court, in answer to arguments presented by the dissenting justices, observed:

"The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71, and *Frontiero* v. *Richardson*, 411 U.S. 677 , involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition – pregnancy – from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra*, and *Frontiero, supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretext designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."

In the second paragraph, the Court synthesized its position:

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups – pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."

At oral argument in the case at bar, counsel for both sets of plaintiffs and counsel for the *EEOC* as amicus curiae, insistently argued that *Aiello* is distinguishable on many grounds. The most significant distinction was said to be that the instant cases involve disparate treatment by employers – private as well as municipal – of pregnant women in the workplace, while *Aiello* involved a social welfare policy created by state legislation.

While deference is to be shown to legislative judgments on social welfare matters, the argument goes, no such deference to allegedly discriminatory employers is warranted under Title VII.

The flaw in this argument is that it begs the question. The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If, as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified – or less justifiable in the employment context than in some other context – can never be reached.

In other words, if the *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the Court. The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination "because of. . . sex." 42 U.S.C. § 2000 e(2)(a)(1).

Plaintiffs get scant help from the cases they cite for the proposition that discrimination on grounds of sex (or gender) means something different when the Fourteenth Amendment is involved than when Title VII comes into play. The cases cited for that proposition are in our view more readily explained by the respective dates of decision than by the rubric under which

they were decided. Thus, *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, upholding protective legislation, was decided in 1937, while *Weeks* v. *Southern Bell Telephone* (5th Cir.) 467 F.2d 95, which ruled the opposite way, was decided in 1972. Similarly, *Goesaert* v. *Cleary*, 335 U.S. 464, was decided in 1948. It seems a safe guess that, in light of *Frontiero* v. *Richardson* (1973) 411 U.S. 677, *Phillips* v. *Martin Marietta Corp.* (1971) 400 U.S. 542, and *Sprogis* v. *United Air Lines* (7th Cir. 1971) 444 F.2d 1194, *cert. den.* 404 U.S. 991, both *West Coast Hotel* and *Goesart* would be decided differently today. In brief, *Aiello* does not represent a retreat from the Court's modern view as to discrimination on grounds of sex (or gender), but – as footnote 20 plainly indicates – a finding that disparity of treatment based on pregnancy does not in and of itself constitute such discrimination.[1]

Having come to this conclusion as to the effect of *Aiello*, the question arises as to what should be done with these lawsuits at the stage of the proceedings. A review of the complaints makes two things plain. *First*, both complaints were obviously drawn for the purpose of invoking the law as declared by the *Aiello* District Court (before it was reversed) to the effect that pregnancy-related disparity "in and of itself" constituted discrimination on grounds of sex (or gender). *Second*, if principles of "notice pleading" were to be applied, both complaints could be read as broad enough to permit proof of the type of "invidious discrimination" that would justify relief under either the Fourteenth Amendment or Title VII.

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[1] By way of illustrating the Court's point, a woman's organization (e.g. a woman's club or actresses' workshop) could hardly be taxed with discriminating on grounds of sex (or gender) if its medical insurance policies provided no coverage for pregnancy-related disabilities. However such disparity of treatment of pregnant persons (who, not necessarily relevant so far as concerns the Amendment, happened to be women) might well run afoul of the equal protection demands of the Fourteenth Amendment, if it could be shown to involve state action and not to be economically or otherwise justifiable.

Any one of three courses of actions would therefore seem possible:

(1) The complaints could be construed under the principles of notice pleading and the parties be allowed to proceed to trial, with the result that the question of the correctness of our interpretation of *Aiello* could be presented to the Court of Appeals on a full trial record.

(2) The complaints could be construed – as the plaintiffs originally intended – to invoke the pre-*Aiello* law that disparity with respect to pregnancy-related disabilities in and of itself constituted discrimination on grounds of sex (or gender), and dismissed without leave to be replead, thus giving plaintiffs an appeal as of right to the Court of Appeals.

(3) The complaints could be so construed but dismissed with leave to replead, and the question of *Aiello's* application to the cases at bar certified to the Court of Appeals.

Upon reflection, only the third of these possible courses of action seems appropriate.

If the first possible course were followed, the plaintiffs would be in almost an impossible position of having to wage a "two front war", designed to present the Court of Appeals with a record calculated to take advantage of pre-*Aiello* law that pregnancy-related disparity in and of itself established a prima facie case under Title VII and designed at the same time to establish a fall back position that the particular practices pursued by these defendents – or some of them – were "invidious" and therefore in violation both of Title VII and of the Fourteenth Amendment. It goes without saying that the methods of proof appropriate to these two possible positions are quite disparate.

Moreover, oral argument on the problems presented by *Aiello* was devoted in large part to trying to ascertain how, if at all, the Court of Appeals could benefit by having the *Aiello* question presented to it on a full trial record. Counsel for both sets of plaintiffs and for *EEOC* as amicus curiae – although exhibiting the advocate's customary reluctance to yield a point – finally conceded that months or pre-trial discovery and weeks of trial would produce no new information which would assist the Court of Appeals in determing what effect, if any, *Aiello* should have on these lawsuits.

Finally, absent and authoritative determination of *Aiello's* effect, it would be almost impossible to define the parameters of the appropriate classes and sub-classes. Plaintiffs, in each case, ask in effect for a class including all women of child bearing age. If our interpretation of *Aiello* be correct it would seem that the class in each suit would have to be confined to women presently pregnant plus those who had actually been denied pregnancy benefits. On the other hand if *Aiello* be inapplicable, the class might well be much more numerous.

The second possible course (dismissal without leave to replead) would present the Court of Appeals with several basically irrelevant questions, such as whether or not plaintiffs had been fairly treated in having their complaints so narrowly construed without an opportunity to replead. Moreover, should the Court affirm the dismissal, plaintiffs might be saddled with wholly unnecessary statute of limitations problems if they then attempted to obtain relief on the theory that defendants, or any of them, had engaged in "invidious" conduct.

We shall therefore follow the third possible course and certify to the Court of Appeals pursuant to 28 U.S.C. § 1292(b) the question whether *Aiello* has established – for the purposes of these actions or either of them – that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender)

within the prohibition either of Title VII or of the Fourteenth Amendment.

We believe that this opinion has demonstrated – and we so certify – that this question is controlling, and one as to which "there is substantial ground for difference of opinion", and that its resoltuion would "materially advance the ultimate termination of the litigation".

SO ORDERED.

Dated: New York, New York
July 30, 1974

WHITMAN KNAPP, U.S.D.J.

APPENDIX D

ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELIN GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs,

-against-

THE CITY OF NEW YORK: ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; ASSOCIATED HOSPITAL SERVICE, INC.; GROUP HEALTH INCORPORATED; UNITED MEDICAL SERVICE, INC.; SOCIAL SERVICE EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants.

ORDER

74 CIV. 304 (W.K.)

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AN OPINION AND ORDER having been entered on July 30, 1974, dismissing plaintiffs' complaint with leave to amend; and the Court of Appeals for the Second Circuit by an Order entered October 2, 1974, having denied plaintiffs' petition for leave to appeal; and plaintiffs having notified this Court by letter dated October 9, 1974, of their election not to amend their complaint, it is

O R D E R E D that plaintiffs' complaint be and the same hereby is dismissed with prejudice.

Dated: New York, New York
October 10, 1974

s/_____
WHITMAN KNAPP
U. S. D. J.